



Supreme Court, U.S.
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No. 08-1304

IN THE
Supreme Court of the United States

FRANKLIN COUNTY POWER OF ILLINOIS, LLC, ET AL.,
Petitioners,

v.

SIERRA CLUB,
Respondent.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Sierra Club submitted sufficient evidence to show that one of its members, Barbara McKasson, would be injured by petitioners' construction, without a valid Clean Air Act permit, of a large, coal-fired power plant three miles from a park that McKasson regularly visits; and, if so, whether McKasson's injury is traceable to petitioners' conduct and could be redressed by an injunction prohibiting construction of the plant until petitioners obtain a valid permit.

RULE 29.6 STATEMENT¹

Respondent Sierra Club has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

¹ Petitioners' Rule 29.6 Statement erroneously states that petitioner EnviroPower, LLC is a Kentucky limited liability company and that Franklin County Power of Illinois, LLC, f/k/a EnviroPower of Illinois, LLC (Franklin County Power) is an Illinois limited liability company. The Kentucky Secretary of State administratively dissolved EnviroPower, LLC on November 1, 2008 (*see* Ky. Sec'y of State, *Online Business Database*, <http://apps.sos.ky.gov/business/obdb> (search for "EnviroPower, LLC")), and the Illinois Secretary of State involuntarily dissolved Franklin County Power on February 13, 2009 (*see* Ill. Sec'y of State, *Department of Business Services Database*, <http://www.ilsos.gov/corporatellc/> (search for "Franklin County Power"))).

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INTRODUCTION

Petitioners ask this Court to overturn a decision of the Seventh Circuit prohibiting them from constructing a large, coal-fired power plant under authority of a Clean Air Act permit that expired in 2003. Although petitioners do not dispute that the plant would be a major source of air pollution and would be built only three miles from a park frequented by at least one Sierra Club member, Pet. App. 3a, 10a-11a, they nevertheless argue that the Sierra Club lacks standing to challenge construction of the plant.

Petitioners do not identify any split among the circuits or unsettled question of federal law that would warrant this Court's review. Instead, they argue that questions of Article III standing are important enough to justify a grant of certiorari "even in the absence of a clear conflict among the circuits." Pet. 13 n.5. The relevant standing analysis, however, is already well-established by this Court's case law (including its decision just this Term in *Summers v. Earth Island Institute*, 129 S. Ct. 1142 (2009)), and the only question posed by the petition is therefore the fact-bound question whether the Seventh Circuit correctly applied the established precedent to the particular evidence in this case. Certiorari is rarely appropriate where, as here, "the asserted error consists of . . . the misapplication of a properly stated rule of law." S. Ct. R. 10.

In any event, the Seventh Circuit reached the only reasonable conclusion based on the undisputed facts. The court relied on the affidavit of Sierra Club member Barbara McKasson, who stated that she would reduce her use of the Rend Lake area if a major coal-fired power plant that did not comply with current emission limits were built nearby. McKasson's affidavit is indistinguishable from the affidavits this Court held sufficient to sup-

port standing in *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167 (2000). Moreover, uncontested evidence submitted by the Sierra Club established that requiring petitioners to obtain a new permit that complied with recent advances in pollution-control technology would substantially reduce or eliminate McKasson's injury.

Although framed as an attack on the Sierra Club's standing, petitioners' real complaint is with the Clean Air Act's citizen-suit provision, which they contend allows "private groups with self-serving agendas" to "prevent needed and beneficial energy plants from being built." Pet. 3, 25. Congress, however, chose to provide a cause of action against "any person who proposes to construct . . . [a] major emitting facility without a permit." 42 U.S.C. § 7604(a)(3). Because petitioners no longer press their objection to the district court's conclusion that their permit has expired, the plant they propose to construct would necessarily be "without a permit" under the Clean Air Act. Petitioners' policy concerns about the impact of the statute on the power industry should be directed to Congress, not to this Court.

STATEMENT

In 2000, Franklin County Power applied for a permit to build a coal-fired power plant in Benton, Illinois. Pet. App. 4a. Because the plant would be a "major emitting facility" under the Clean Air Act, the company was required to obtain a permit from the Illinois Environmental Protection Agency (IEPA) before it could begin construction. Pet. App. 3a-4a. The required permit, known as a "Prevention of Significant Deterioration" or "PSD" permit, sets limits on emissions based on "best available control technology" standards for air pollutants. Pet. App. 3a; see 42 U.S.C. § 7475(a).

The IEPA issued a PSD permit to Franklin County Power on July 3, 2001. Pet. App. 4a. Once the permit was issued, the Clean Air Act required the company to act quickly to preserve its right to construct the plant. Under the Act and its implementing regulations, PSD permits automatically expire if a company does not “commence” construction of a permitted plant within 18 months of the permit’s issuance, discontinues construction during any 18-month period, or does not complete construction within a reasonable time. Pet. App. 3a; see 40 C.F.R. § 52.21(r)(2), 124.5(g)(2). These timeliness requirements provide an “important assurance” that power plants keep pace with updated emission limits and rapidly evolving pollution-control technology. See *In re W. Suburban Recycling & Energy Ctr., L.P.*, 8 E.A.D. 192 (E.A.B. 1999). Without them, a permit would lock in place existing levels of emissions, allowing companies to build plants long after the limits are considered unacceptable and the control technology has become obsolete. See *id.*

Franklin County Power failed to comply with the law’s timeliness requirements in several ways:

First, the company did not commence construction of the plant within 18 months of issuance of the permit. Because the IEPA issued the company’s permit on July 3, 2001, the last day for it to begin construction was January 3, 2003. Pet. App. 16a-17a. The company, however, did no work on the site until, at the earliest, January 8, 2003, five days after the permit had expired. Pet. App. 18a-19a.²

² In the district court, the company argued that it was entitled to various extensions that pushed its deadline past January 3, 2003. Pet. App. 16a n.3. On appeal, however, the company abandoned this argument. *Id.* Thus, the “operative” date in the Seventh Circuit was January 3, 2003. *Id.*

Second, after the company began work on the site in January 2003, it did no more than dig a hole. Pet. App. 19a. Because “commencement” under the Clean Air Act requires the start of “physical on-site construction” of the emission source, the company would not have timely commenced construction even if it had begun digging the hole before the January 3, 2003, deadline. Pet. App. 18a-19a; see 42 U.S.C. § 7479(2)(A).³

Third, just over a month after digging began, the contractor ceased all work on the site because of a payment dispute. After the company also failed to pay its rent, the company’s landlord filled in the hole the company had dug. Pet. App. 19a, 43a. Thus, even if the company had commenced construction before expiration of the permit, that construction would not have been a “continuous program of physical on-site construction,” as required by the Clean Air Act, 42 U.S.C. § 7479(2)(A) (emphasis added). See Pet. App. 19a.

Fourth, after work ceased in February 2003, the company did not start digging another hole until more than 18 months later, on September 29, 2004. Pet. App. 5a. Regardless of whether work had commenced in January or February of 2003, the permit would have therefore subsequently expired after 18 months of inactivity. Pet. App. 20a.

³ As an alternative to physical on-site construction, the Clean Air Act considers an owner to have commenced construction if the owner has “entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time.” 42 U.S.C. § 7479(2)(A). Both the district court and Seventh Circuit concluded that petitioners had not entered into such a contract, Pet. App. 20a-27a, and petitioners do not raise the issue in the petition.

With a partially dug hole being the only progress made on the site in almost four years, the IEPA on November 19, 2004, made a "preliminary finding" that the company's PSD permit had expired. Pet. App. 5a, 44a. Nevertheless, the company continued to maintain that its permit was valid and that nothing prevented it from proceeding with construction of the plant. Pet. App. 10a. To stop the company from going forward with construction under an expired permit and outdated control-technology standards, the Sierra Club filed suit under the Clean Air Act's citizen-suit provision. 42 U.S.C. § 7604(a)(3). That provision states that "any person" may bring a civil action to prevent construction of a "new or modified major emitting facility without a permit" or a facility that is alleged to be "in violation of any condition of such permit." *Id.*

After discovery, the district court granted the Sierra Club's motion for summary judgment. The court first rejected petitioners' argument that the Sierra Club lacked standing, holding that at least one Sierra Club member, Barbara McKasson, was injured by petitioners' proposal to construct the plant using outdated "best available control technology" standards. Pet. App. 51a. Turning to the merits, the court held that the company's permit automatically expired when it failed to commence construction within 18 months of the permit's issuance and that, even if construction had commenced on time, the permit would have subsequently lapsed after 18 months of inactivity. Pet. App. 56a. The district court therefore granted an injunction prohibiting petitioners from continuing to construct the proposed plant "until they have obtained a valid PSD Permit." Pet. App. 67a.

On appeal in the Seventh Circuit, petitioners again argued that the Sierra Club lacked standing to pursue its claims. Like the district court, the Seventh Circuit disagreed, holding that McKasson's interests were suffi-

cient to give the group standing. Pet. App. 7a-14a. The Seventh Circuit also agreed with the district court's decision to enjoin construction of the proposed plant. The court concluded that petitioners' permit to build the plant had expired and therefore that continued construction would be "without a permit" and in violation of the Clean Air Act. Pet. App. 15a. Moreover, because petitioners had not complied with the time limits on the face of the permit, the court concluded that construction would be "in violation of [a] condition" of the permit. *Id.*

In the petition, petitioners no longer challenge the lower courts' decision that their permit has expired. The only question here is whether the Sierra Club has standing to challenge petitioners' construction of the proposed plant with an expired permit.

REASONS FOR DENYING THE WRIT

I. The Relevant Standard for Determining Standing in This Case Is Well-Established and Undisputed.

Although petitioners claim that the Seventh Circuit's decision that the Sierra Club had standing "plainly ignored" established precedent, the standard they urge is precisely the standard applied by the court. The undisputed test, as set forth by this Court in *Laidlaw* and applied by both the district court and Seventh Circuit below, requires the Sierra Club to show that at least one of its members "(1) . . . has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that

the injury will be redressed by a favorable decision.” *Laidlaw*, 528 U.S. at 180-81.⁴

In *Laidlaw*, plaintiff environmental groups challenged a water-treatment plant’s pollution emissions under the Clean Water Act, which has a citizen-suit provision very similar to the provision at issue in this case. *Id.* at 174-75, 177; see *Friends of the Earth v. Consol. Rail Corp.*, 768 F.2d 57, 63 (2d Cir. 1985) (noting that the citizen-suit provision of the Clean Water Act “was explicitly modeled on” and is a “clear parallel” of the Clean Air Act’s provision). The defendant argued that the groups lacked standing to challenge pollution emissions in the absence of “demonstrated proof of harm to the environment.” *Id.* at 181. This Court rejected that argument, holding that “[t]he relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff.” *Id.* Like the Sierra Club here, the plaintiff environmental groups in *Laidlaw* showed this type of injury with affidavits of members who used the affected areas for sports and recreation and who stated that they would be less likely to continue using those areas if the challenged pollution were to continue. *Id.* at 181-83.

Earlier this Term, this Court in *Summers*, 129 S. Ct. 1142, reaffirmed the continuing applicability of *Laidlaw*.

⁴ “An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Laidlaw*, 528 U.S. at 181. Petitioners do not argue that the issues are not germane to Sierra Club’s purpose or that participation of individual Sierra Club members would be required. Therefore, there is no dispute that Sierra Club has standing to challenge construction of the plant as long as at least one of the organization’s members would have standing.

There, environmental organizations challenged a United States Forest Service regulation that deprived them of the opportunity to comment on a timber sale at a forest site known as Burnt Ridge. *Id.* at 1147-48. In support of standing, the organizations submitted the affidavit of Ara Marderosian, a member who stated that he had repeatedly visited Burnt Ridge, that he had plans to do so again, and that the challenged regulation harmed his interests in viewing the area's flora and fauna. *Id.* at 1149-50. Before the case reached this Court, however, the parties had settled their dispute over the Burnt Ridge timber sale. *Id.* This Court held that the settlement deprived the plaintiffs of standing because there was no longer any identified "concrete application that threatens imminent harm to Marderosian's interests." *Id.* At the same time, it reaffirmed the principle that a plaintiff can challenge environmental harm that "affects the recreational or even the mere esthetic interests of the plaintiff." *Id.* Indeed, the Forest Service conceded that Marderosian's affidavit was enough to establish his standing to challenge the Burnt Ridge timber sale. *Id.* at 1149.

Petitioners identify no circuit split on the proper standard to apply in cases like this one and no decision that even arguably conflicts with *Laidlaw* or with the decision below. Those federal courts of appeals that have addressed the question have universally rejected any requirement that plaintiffs show evidence of actual environmental harm and have accepted as sufficient affidavits establishing that the challenged emissions will affect the plaintiffs' use and enjoyment of the environment. See, e.g., *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 163-64 (4th Cir. 2000) (en banc) ("Courts are not at liberty to write their own rules of evidence for environmental standing by crediting only direct evidence of impairment. Such elevated evidentiary

hurdles are in no way mandated by Article III.”); *see also Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1149 (9th Cir. 2000). The one district court decision petitioners identify, which required plaintiffs to produce “evidence regarding the magnitude of the diminished air quality,” predates *Laidlaw* and cannot be reconciled with *Laidlaw*’s holding that no “demonstrated proof of harm to the environment” is required. *Ogden Projects, Inc. v. New Morgan Landfill Co.*, 911 F. Supp. 863, 869-70 (E.D. Pa. 1996).

Because the proper standard, as set forth in *Laidlaw* and *Summers*, is essentially undisputed, the only questions raised by the petition are the questions posed by the particular facts of the case—namely, whether the Sierra Club has shown that one of its members, Barbara McKasson, would be injured by petitioners’ construction of a power plant in Benton, Illinois without a valid permit, and whether that injury is both traceable to petitioners’ conduct and redressable by the federal courts. The answer to those questions depends, as the Seventh Circuit recognized, on the “specific facts” of the case and on the “manner and degree of evidence” presented. Pet. App. 7a (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)); *see also Ecological Rights Found.*, 230 F.3d at 1149 (holding that environmental standing cases “are not to be evaluated in a one-size-fits-all, mechanistic manner”). Although petitioners may disagree with the conclusion reached by the Seventh Circuit, they have no choice but to acknowledge that the case involves, at most, “misapplication of standing principles established by this Court.” Pet. 24. Under this Court’s Rule 10, a petition is “rarely granted” when the asserted error consists of an alleged “misapplication” of a settled rule of law. There are no exceptional circumstances here that justify making this case the rare exception.

II. The Seventh Circuit's Decision Was Correct.

Even if error correction were a valid basis for seeking this Court's review, certiorari would be inappropriate here because the result reached by the Seventh Circuit was not only reasonable, but required by this Court's standing jurisprudence.

1. The first prong of the standing analysis requires the plaintiff to show an "injury in fact." *Laidlaw*, 528 U.S. at 180-81. In concluding that McKasson would be injured by construction of the plant, the Seventh Circuit relied on this Court's decisions in *Laidlaw* and other cases holding that "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." Pet. App. 7a-8a (quoting *Laidlaw*, 528 U.S. at 183); see also *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972). These are precisely the allegations in McKasson's affidavit. The affidavit states that McKasson visits Rend Lake, a beautiful natural area less than three miles from the proposed site of the power plant, to fish, kayak, camp, and enjoy the natural beauty and clean environment. Pet. App. 8a. McKasson states that she has visited Rend Lake with her family every other year since 1987 and plans to continue to do so indefinitely. Pet. App. 8a, 50a. She also states that she would stop visiting the park if a major polluting power plant with an outdated permit were constructed three miles away. *Id.*

McKasson's affidavit is indistinguishable from affidavits held sufficient to support standing in *Laidlaw*. For example, *Laidlaw* held that the affidavit of Kenneth Lee Curtis established his standing to challenge illegal river discharges under the Clean Water Act. *Laidlaw*, 528 U.S. at 181-82. Curtis stated in his affidavit that he "would like to fish, camp, swim, and picnic in and near

the river between 3 and 15 miles downstream from the facility, as he did when he was a teenager, but would not do so because he was concerned that the water was polluted by [the defendant's] discharges." *Id.* Similarly, as already mentioned, *Summers* involved an affidavit by Ara Marderosian that all parties agreed was sufficient to support standing. See *supra* at 8. The federal courts of appeals have relied on similar affidavits to find standing in environmental cases. See, e.g., *N.Y. Pub. Interest Research Group v. Whitman*, 321 F.3d 316 (2d Cir. 2003) (allegations that members residing within a few miles of defendants' facility were concerned about pollutant emission levels if the facility did not comply with the Clean Air Act); *Gaston Copper Recycling*, 204 F.3d at 153 (allegations that members would make greater recreational use of a waterway except for concern over the defendant's discharges); *Texans United for a Safe Econ. Educ. Fund v. Crown Cent. Petroleum Corp.*, 207 F.3d 789, 792 (5th Cir. 2000) ("[B]reathing and smelling polluted air is sufficient to demonstrate injury-in-fact and thus confer standing under the [Clean Air Act].") (internal quotation omitted). Petitioners identify no decisions that hold otherwise.

Nor have petitioners identified any evidence contradicting the statements in McKasson's affidavit about the proposed plant's pollutants and their likely effect on her use and enjoyment of Rend Lake. Instead, petitioners criticize McKasson's affidavit on the ground that it fails to "specify which pollutant would cause what harm." Pet. 10. This claim is irrelevant in light of *Laidlaw's* holding that plaintiffs need not produce "demonstrated proof of harm to the environment." 528 U.S. at 181. It is also false. Contrary to petitioners' contention, McKasson's affidavit stated her specific concerns about the health effects and reduced visibility caused by mercury, sulfur dioxide, and nitrogen oxides that would be emitted by

the plant. Pet. App. 10a-11a, 51a. Indeed, petitioners have never disputed that the plant would be a source of pollution in the local environment. Pet. App. 3a, 10a-11a. It is hardly a stretch to conclude that a "major emitting facility" like the large, coal-fired power plant petitioners propose would have a negative effect on a natural area less than three miles away.

The only evidence petitioners identify in regard to McKasson's affidavit is her statement, elicited in a deposition, that she did not learn about this case until after the Sierra Club filed suit. Pet. 7, n.3. That statement, though true, is irrelevant. Petitioners do not explain why McKasson's knowledge of the lawsuit on the date of filing has anything to do with the question whether she would be injured. Regardless, McKasson faced a threat of injury on the date the lawsuit was filed that was caused by petitioners' conduct and was redressable by a court. Moreover, McKasson's affidavit establishes that she is concerned about air pollution, both in general and from the proposed plant, has been active in opposing construction of other coal-fired power plants, and moved away from Chicago for the purpose of escaping the city's smog. If petitioners' intend to imply that McKasson is not seriously interested in the controversy, they are wrong.⁵

2. Petitioners' only argument for distinguishing *Laidlaw* is the unfounded contention that, unlike the plaintiffs there, the Sierra Club has not alleged that any environ-

⁵ Sierra Club also submitted the affidavit of another Sierra Club member, Verena Owen, in support of its claim for standing. Neither the district court nor the Seventh Circuit reached the question of Owen's standing because both courts found that Sierra Club sufficiently established that McKasson had standing to sue. Pet. App. 51a; Pet. App. 13a. If this Court were to hold that McKasson lacks standing, it should remand for a determination of Owen's standing.

mental law or standard has been violated. Petitioners argue that, because the IEPA granted Franklin County Power a PSD permit eight years ago, the Sierra Club's claims stem from "emission limitations that the federal and state environmental agencies deemed sufficient to protect air quality under the [Clean Air Act]." Pet. 16. Without any citation to authority, petitioners conclude that "[p]ersonal fears of emissions that comply with federal clean air standards . . . cannot be credited as a 'realistic' or 'reasonable' basis for standing." *Id.*

Petitioners' argument ignores the fact that PSD permits do not remain valid indefinitely. See 40 C.F.R. § 52.21(r)(2). The Clean Air Act and its implementing regulations state that if construction is not commenced within 18 months of receiving a permit, is discontinued for 18 months or more, or is not completed within a reasonable time, the facility may not be constructed with the emission standards in the permit. *Id.* Once a PSD permit has expired, an agency must make new determinations of best available control technology standards based on the current level of air pollution in the locality of the plant and advances in the development of pollution-control technology. See *In re N.Y. Power Auth.*, 1 E.A.D. 825, 826 (E.A.B. 1983) (The Clean Air Act's statutory time limit "is one of the means of ensuring that the requirement for best available control technology . . . involves reasonably current pollution controls.").

Here, both the district court and the Seventh Circuit agreed that the permit automatically expired when petitioners did not "commence" construction within 18 months after the permit was granted or, at the latest, when petitioners discontinued construction for more than 18 months.⁶ The petition does not challenge these

⁶ Because both the district court and the Seventh Circuit determined that the permit expired under the first two prongs, neither

aspects of the decisions below. If petitioners proceed with constructing the plant, as they would do absent the injunction, they would be constructing a plant without a valid permit and therefore would have violated the Clean Air Act. Petitioners are thus wrong to claim that their expired permit gives them authority to build the proposed plant.

Similarly, petitioners' claim that the challenge is a "collateral attack" on the IEPA's permit decision fails for the simple reason that there is no existing permit to attack. The two district court decisions on which petitioners rely held that a plant should not be penalized for compliance with a "facially valid state permit." *Nat'l Parks Conservation Ass'n v. Tenn. Valley Auth.*, 175 F. Supp. 2d 1071, 1078 (E.D. Tenn. 2001); see *Families Concerned About Nerve Gas Incineration v. U.S. Dep't of Army*, 380 F. Supp. 2d 1233, 1257 (N.D. Ala. 2005). Even assuming these decisions were correct, they would not be applicable here. Petitioners' permit in this case is not facially valid—it is facially *invalid*. A challenge to construction of a plant without a valid permit is exactly the sort of case the Clean Air Act's citizen-suit provision contemplates. See 42 U.S.C. § 7604(a)(3) (providing a cause of action against "any person who proposes to construct . . . [a] major emitting facility without a permit").

In any case, the applicability of the Clean Air Act in these circumstances is a question of the statute's scope and therefore goes, at most, to the merits rather than to standing. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 92 (1998). Whether an agency has approved construction of a plant is irrelevant to the question whether the construction would injure the plaintiff. See *Lujan*, 504 U.S. at 573 n.7 ("[U]nder our case law, one living ad-

court reached the question whether construction could be completed within a reasonable time.

jaacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement"); *LaFleur v. Whitman*, 300 F.3d 256, 270 (2d Cir. 2002) (finding standing to challenge pollution that complied with national air-quality standards).

3. As petitioners note, the second two prongs of the standing inquiry—traceability and redressability—are closely related to the issue of injury. Pet. 18. Here, little additional analysis is necessary. McKasson's injuries are "fairly traceable" to construction of the plant because constructing a plant that does not comply with current emission standards would cause the environmental and recreational harms set forth in McKasson's affidavit. Similarly, McKasson's injuries are redressable by a favorable decision because requiring the plant to abide by current emission standards would reduce or eliminate her exposure to the source of her injury.

Petitioners challenge redressability on the ground that, even if they are required to obtain a new permit, there is no guarantee that the permit would impose more stringent pollution limitations than were imposed by their expired 2001 permit. The reason that the Clean Air Act imposes strict time limits for construction of permitted plants, however, is to assure that new plants keep up with evolving pollution-control technology. See *W. Suburban Recycling & Energy Ctr.*, 8 E.A.D. 192; *N.Y. Power Auth.*, 1 E.A.D. 825. As the Seventh Circuit recognized, technology improvements over the past nine years guarantee that a new permit would impose more stringent pollution emission standards on petitioners. Pet. App. 12a-13a. Indeed, the Sierra Club submitted evidence showing that newer permits granted by the IEPA imposed *significantly* more stringent limits than petitioners' 2001 permit. Pet. App. 13a. Petitioners did not contest this evidence in the district court and, aside

from vaguely protesting that "each coal-fired power plant has unique characteristics," Pet. 21 n.7, have no answer to it here.

Regardless, there is no question that the district court's injunction will, at a minimum, give McKasson significant, if only temporary, relief. Because petitioners' PSD permit has expired, they have no right to build the proposed plant unless and until a new permit is obtained. The district court's order thus allows McKasson to enjoy the benefits of the park, at least for the time being, without *any* pollution from the power plant. Moreover, petitioners are not guaranteed a new permit, and, if they fail to obtain one, McKasson's temporary relief, sufficient in itself to establish standing, would be made permanent. Thus, although petitioners argue that the Sierra Club's arguments are "speculative," it is actually petitioners who are speculating. The possibility that petitioners may apply for a new permit and that the IEPA may grant one sometime in the future is not sufficient to defeat the Sierra Club's standing to challenge construction *now*.

III. Petitioners' Predictions About the Implications of the Decision Below Amount to Nothing More Than Policy Disagreements With the Clean Air Act.

Petitioners devote a significant portion of their brief to policy arguments, contending that allowing this case to proceed would "clog[] the courts with questionable citizen suits," that would "prevent needed and beneficial energy plants from being built." Pet. 3. Even if this were true, it would constitute, at most, an argument for repeal of the Clean Air Act's citizen-suit provision. Congress intended the Clean Air Act to allow for "economic growth . . . in a manner consistent with the preservation of existing clean air resources." 42 U.S.C. § 7470(3). The citizen-suit provision is part of Congress's attempt to

balance the sometimes competing goals of growth and clean air, designed to "both goad the responsible agencies to more vigorous enforcement of the anti-pollution standards and, if the agencies remained inert, to provide an alternative enforcement mechanism." *Proffitt v. Rohm & Haas*, 850 F.2d 1007, 1011 (3d Cir. 1988) (internal quotation omitted). In this process, "Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests." *Consol. Rail Corp.*, 768 at 63 (internal quotation omitted). Petitioners are free to ask Congress to rewrite the statute, but the plain language of the law as currently written grants the Sierra Club the right to challenge construction of a power plant that lacks a valid permit.

In any event, petitioners' catastrophic predictions about the impact of the Seventh Circuit's decision are unsupported by the record and seriously overblown. The decision below holds only that petitioners' permit has expired and requires only that petitioners refrain from constructing their proposed plant "until they have obtained a valid PSD Permit." Pet. App. 67a. Petitioners are therefore required to do no more than to live up to their legal obligations under the Clean Air Act. Petitioners' argument that the Seventh Circuit's decision will slow down the production of "needed and beneficial energy plants" is particularly disingenuous given that it is petitioners' long delay in constructing the plant that caused its permit to lapse in the first place.

For the same reason, petitioners' argument that the decision interferes with the judgment of the agencies charged with regulating power-plant emissions gets things backward. Petitioners are free to seek a new permit from the IEPA at any time, in which case the agency will decide whether and under what conditions the plant should be built. Far from allowing an end-run around the

agency, the injunction thus ensures that the IEPA will have an opportunity to exercise its discretion before the proposed plant is constructed.⁷

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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⁷ Petitioners' speculation that the IEPA has deferred issuing a final ruling on the validity of the permit in deference to this litigation is unsupported by anything in the record and has no basis in law.